

67205-3

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NO. 67205-3-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARK MOE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George N. Bowden, Judge
The Honorable David A. Kurtz, Judge

BRIEF OF APPELLANT

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
JAN 4 4:27 PM '12

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
THE TRIAL COURT MISCALCULATED APPELLANT'S OFFENDER SCORE, REQUIRING RE-SENTENCING.	3
D. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Cross
156 Wn. App. 568, 234 P.3d 288 (2010) 3

State v. Parker
132 Wn.2d 182, 937 P.2d 575 (1997) 4

State v. Wilson
170 Wn.2d 682, 244 P.3d 950 (2010) 3

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.94A.517 4

RCW 9.94A.525 4

RCW 9.94A.589 3

Sentencing Reform Act 1, 3

A. ASSIGNMENT OF ERROR

The trial court miscalculated appellant's offender score.

Issue Pertaining to Assignment of Error

The trial court calculated appellant's offender score as nine.

Under the Sentencing Reform Act (SRA), his offender score is only eight. Does this case require remand for resentencing?

B. STATEMENT OF THE CASE

On May 19, 2009, the Snohomish County prosecutor charged appellant Mark Moe with possessing cocaine. CP 42-43. On September 2, 2009, Moe agreed to enter the CHART Program (drug court). CP 33-36. As a condition, Moe agreed that he could be terminated from the program if he engaged in an unlawful act. CP 34.

On April 30, 2010, the prosecutor entered an amended information, charging Moe with a second count of possessing cocaine. Supp. CP __ (sub 64, Amended Information). Moe entered an amended agreement to continue drug court. CP 27-31. The new agreement contained the same stipulation regarding criminal acts. CP 27-31.

On October 17, 2010, Moe discovered a fellow resident had supplied his long-time girlfriend with drugs behind his back. Moe

became angry and, according to police reports, assaulted his girlfriend, broke into the fellow resident's room, and destroyed some of the resident's personal property. RP (12-9-10) 58-60. Moe was terminated from drug court due to this incident. RP (12-9-10) 60-61.

On December 17, 2010, the trial court found Moe guilty of both possession counts, based on a stipulated record. CP 25-26. Moe's sentencing was delayed and he was ordered to get an assessment by the Department of Corrections (DOC), for a possible Drug Offender Sentence Alternative (DOSA). RP (12-17-10) 8. After Moe failed to appear and complete the evaluation (CP 14-17, 23-24), the trial court concluded Moe was not showing responsibility and, therefore, he was not an appropriate DOSA candidate. RP (5-25-11) 11-14. The Court then determined Moe's offender score was nine and sentenced him to 18 months -- the standard-range mid-point. CP 3-13. Moe appeals this sentence. CP 1-2.

C. ARGUMENT

THE TRIAL COURT MISCALCULATED APPELLANT'S OFFENDER SCORE, REQUIRING RE-SENTENCING.

Appellate courts review a trial court's sentencing calculation de novo. State v. Cross, 156 Wn. App. 568, 587, 234 P.3d 288 (2010). If a trial court miscalculates an offender score and this involves a legal error, the defendant cannot waive his objection because such a sentence lacks statutory authority. State v. Wilson, 170 Wn.2d 682, 688–89, 244 P.3d 950 (2010). The remedy for a miscalculated offender score is resentencing using the correct offender score. Wilson, 170 Wn.2d at 691.

Moe's offender score for the controlled substances convictions should be eight, not nine. Moe's criminal history amounts to seven points – one point for each of his seven prior offenses.¹ CP 4. Additionally, the SRA requires the sentencing court to treat his other current possession conviction as if it were a prior conviction for the purpose of his offender score. RCW 9.94A.589(1)(a). This adds one more point for each count. In sum, Moe's offender score on each possession count amounts to eight.

¹ The prosecutor mistakenly told the trial court Moe had eight prior felonies, rather than seven. Compare, RP (5-25-11) 3, with, CP 4.

Although the standard sentence range cited by the trial court is correct,² the sentence is still legally incorrect because the trial court miscalculated Moe's offender score. See, RCW 9.94A.525(7). Thus, the sentence should be amended to reflect the correct offender score. Moreover, the trial court should be given an opportunity to consider whether it would still sentence Moe to the middle of the standard range despite his lower offender score or whether it would reduce the amount of months to be served below the midpoint. State v. Parker, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

² See the drug offender sentencing grid in RCW 9.94A.517 showing the same range for 6 to 9 points.

D. CONCLUSION

Appellant respectfully asks this Court to remand for a new sentencing hearing.

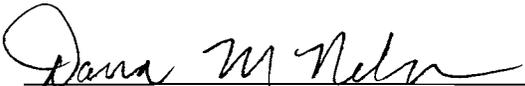
Dated this 4TH day of January, 2012.

Respectfully submitted

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Respondent,)	
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vs.)	COA NO. 67205-3-1
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)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 4TH DAY OF JANUARY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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EVERETT, WA 98201

- [X] MARK MOE
BISHOP LEWEIS WORK RELEASE
708 8TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 4TH DAY OF JANUARY 2012.

x *Patrick Mayovsky*

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2012 JAN -4 PM 4:27